

***United States Court of Appeals
for the
District of Columbia Circuit***



**TRANSCRIPT OF
RECORD**

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Court of Appeals of the District of Columbia.

JANUARY TERM, 1913.

No. 2489.

976

GEORGE E. WARDER, FRANK WARDER, ELLA C. GRAY,
AND MARY S. WILSON, APPELLANTS,

vs.

CHARLES NEWBURGH.

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF
COLUMBIA.

FILED DECEMBER 10, 1912.

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INDEX.

	Original. Print	
Caption	<i>a</i>	1
Declaration.	1	1
Plea.....	2	2
Joinder in issue	3	2
Memorandum: Verdict for plaintiff	3	2
Order overruling motion for new trial; judgment.....	3	3
Appeal.....	4	3
Memoranda: Time to submit exceptions and file record extended; appeal bond approved and filed; bill of exceptions submitted; time to file record further extended	4	3
Order making bill of exceptions part of record.....	5	3
Bill of exceptions.....	5	3
Deed in trust from Lydia R. Faunce <i>et al.</i> to J. H. Adriaans, trustee.....	6	4
Deed from J. H. Adriaans, trustee, to Charles Newburgh	10	6
Testimony of Floyd E. Davis	11	7
Harry Himelright.....	11	7
Alice C. Gray.....	11	7
Timothy J. Broderick.....	12	7
Walter C. English.....	12	7
Mary S. Wilson.. ..	12	8
Paul A. Menzel.....	12	8

	Original.	Print
Testimony of Ann E. Davis.....	13	8
R. Stone Jackson	14	8
Thomas Ritter.....	14	9
Charles A. Dunnington.....	15	9
William C. Taylor.....	15	9
James G. Madison.....	15	9
Ann Matilda Griffin.....	16	10
John K. Pfeil.....	17	10
J. Tyler Powell.....	17	10
Ann Rebecca Dove.....	17	11
Catherine Buck.....	18	11
William H. Griffin	20	12
J. Wilmer Latimer.....	25	14
Walter C. English.. ..	27	15
Harry M. Clabaugh.....	27	16
Assignment of errors	29	16
Designation.....	31	17
Abstract from rough notes of circuit court No. 2.....	32	18
Affidavit of John H. Adriaans as to extension of time.....	32	18
Motion to amend records of court	33	19
Affidavit in support of motion.....	33	19
Order overruling motion.....	35	20
Additional designation of record on appeal.....	35	20
Clerk's certificate.....	37	20

In the Court of Appeals of the District of Columbia.

No. 2889.

GEORGE E. WARDER et al., Appellants,
vs.
CHARLES NEWBURGH.

a Supreme Court of the District of Columbia.

No. 52884. At Law.

CHARLES NEWBURGH, Plaintiff,
vs.
GEORGE E. WARDER, FRANK WARDER, ELLA C. GRAY, and MARY S.
WILSON, Defendants.

UNITED STATES OF AMERICA,
District of Columbia, ss:

Be it remembered, that in the Supreme Court of the District of Columbia, at the City of Washington, in said District, at the times hereinafter mentioned, the following papers were filed and proceedings had, in the above-entitled cause, to wit:

1 *Declaration.*

Filed September 6, 1910.

In the Supreme Court of the District of Columbia.

No. 52884. At Law.

CHARLES NEWBURGH, Plaintiff,
vs.
GEORGE E. WARDER, FRANK WARDER, ELLA C. GRAY, and MARY S.
WILSON, Defendants.

The plaintiff sues the defendants to recover parts of lots 15 and 16, in Square 503, in the City of Washington, District of Columbia, beginning for the same 36 feet from the northwest corner of said lot 16, running thence due east 81 feet 6 inches; thence due south 12

feet; thence with the south line of lot 16 westerly 7 feet 6 inches; thence due south 6 inches; thence westerly on lot 15, 74 feet to the line of Sixth Street; and thence with Sixth Street 12 feet 6 inches to the beginning; being premises known as 1322 Sixth Street Southwest, in which said described premises plaintiff claims the fee-simple title, and of which he was lawfully possessed, to wit, on the ninth day of March A. D. 1909, when the defendants entered upon the same and unlawfully ejected the plaintiff therefrom.

And the plaintiff claims the possession of said piece or parcel of ground, with the improvements thereon and the appurtenances thereof, and the costs of this suit.

2 And the plaintiff further sues the defendants for money payable by the defendants to the plaintiff for that the defendants having as aforesaid ejected the plaintiff from the aforesaid premises, have, from the day and date aforesaid taken and received, and still continue to take and receive, the rents, issues and profits thereof, and to use, occupy and enjoy the said premises to the damage of the plaintiff Five Hundred (500) dollars, which amount the plaintiff claims besides costs of this suit.

J. H. ADRIAANS,
Attorney for Plaintiff.

The defendants are to plead hereto on or before the twentieth day, exclusive of Sundays and legal holidays, occurring after the day of the service hereof; otherwise judgment.

J. H. ADRIAANS,
Attorney for Plaintiff.

Plea.

Filed September 29, 1910.

* * * * *

The defendants say that they are not guilty in manner and form as alleged in the Declaration.

J. W. LATIMER,
Attorney for Defendants.

3

Joinder in Issue.

Filed October 10, 1910.

* * * * *

The plaintiff joins issue upon the defendants' plea.

J. H. ADRIAANS,
Attorney for Plaintiff.

Memorandum.

June 14, 1912.—Verdict for Plaintiff for possession of property.

Supreme Court of the District of Columbia.

FRIDAY, June 21st, 1912.

Session resumed pursuant to adjournment, Hon. Ashley M. Gould, Justice presiding.

* * * * *

Come now the parties hereto by their respective attorneys of record, whereupon the motion for a new trial filed herein being argued and submitted, it is ordered that said motion be and the same is hereby overruled and judgment on verdict is ordered. Wherefore, it is considered that the plaintiff have and recover of the defendants herein possession of parts of lots 15 and 16, in Square 503, in the City of Washington, District of Columbia, beginning for the same 36 feet from the northwest corner of said lot 16, running thence, due east 81 feet 6 inches; thence due south 12 feet; thence with the south line of lot 16 westerly 7 feet 6 inches; thence due south 6 inches; thence westerly on lot 15, 74 feet to the line of Sixth Street; and thence with Sixth Street 12 feet 6 inches to the beginning; being premises known as 1322 Sixth Street Southwest, and also recover of defendants his costs of suit to be taxed by the clerk, and have execution.

From the foregoing the defendants by their attorney Mr. J. Wilmer Latimer, in open court, note an appeal to the Court of Appeals. Whereupon, the penalty of a bond for costs, is hereby fixed in the sum of One Hundred Dollars (\$100.00) or to operate as a supersedeas, in the sum of Three Hundred Dollars.

Memoranda.

July 12, 1912.—Time to submit exceptions and file record in appellate court extended to September 16, 1912, inclusive.

July 15, 1912.—Appeal bond approved and filed.

September 16, 1912.—Bill of Exceptions submitted. Time to file record further extended to November 1, 1912.

October 25, 1912.—Time to file record further extended to December 15, 1912, inclusive.

5 Supreme Court of the District of Columbia.

FRIDAY, November 15th, 1912.

Session resumed pursuant to adjournment, Hon. Daniel Thew Wright, Justice, presiding.

* * * * *

By Justice Gould.

The Court having this day signed the Bill of Exceptions, taken at the trial of this cause and heretofore submitted, now hereby orders the same of record nunc pro tunc.

Bill of Exceptions.

Filed November 15, 1912.

* * * * *

Be it remembered, that at the trial of this case before the Honorable Ashley M. Gould, presiding justice, and a jury, the plaintiff and defendants introduced evidence to the court and jury of which the following is the substance, to wit:

Plaintiff's Evidence.

Record in Equity cause No. 27,162, wherein Lydia R. Faunce, et al., were plaintiffs, and Harry Himelright, et al., were defendants, tending to show that plaintiffs and defendants herein claimed title to the property in question through Thomas Ritter, as a common source of title, and that said Ritter died seized and possessed of said property, intestate and without issue.

6 Deed in Trust from Lydia R. Faunce and others to John H. Adriaans, trustee, dated Dec. 5, 1906, and recorded March 5, 1908, in Liber 3131, at folio 180, et seq. of the Land Records of the District of Columbia, was then offered in evidence by plaintiff, to which deed as evidence defendants' counsel then and there objected on the ground that said deed was void as champertous and against public policy; but said objection was overruled by the Court, and the said deed admitted in evidence; whereupon counsel for the defendants excepted, and said exception was duly noted on the minutes of the court before the jury retired. Said deed (omitting the acknowledgments) is as follows:

Deed in Trust.

Lydia R. Faunce et al.
to
John H. Adriaans, Tr.

This deed, made this fifth day of December, 1906, by and between Lydia R. Faunce, Mary V. Bayha, Catherine M. P. Buck, Charles W. Griffin and Emma R. Griffin, his wife, William H. Griffin and Mary Griffin, his wife, sole surviving heirs at law of Thomas Ritter (also known as Thomas T. Ritter, and also as Heenan Ritter) parties of the first part, and John H. Adriaans, Trustee, party of the second part.

7 Witnesseth, That in consideration of five (5) dollars the parties of the first part do grant unto the party of the second part in fee simple all of the right, title and interest of the parties of the first part in and to all those pieces or parcels of land in the city of Washington, in the District of Columbia, described as follows: to wit: Beginning at a point distant thirty-six (36)

feet South from the Northwest corner of original lot numbered sixteen (16) in square numbered five hundred and three (503) in the city of Washington, in the District of Columbia, and running thence due East eighty-one feet and six inches (81 ft. 6 in.) thence due South twelve (12) feet; thence by and with the South line of lot sixteen (16) westerly seven (7) feet and six (6) inches, thence due south six (6) inches; thence westerly on lot fifteen (15) parallel to the dividing line between lots fifteen (15) and sixteen (16) seventy-four (74) feet to the line of Sixth street, and thence by and with the line of Sixth street Northerly twelve (12) and six (6) inches to the place of beginning, being the aggregate of three pieces of lots fifteen (15) and sixteen (16) in said square separately described respectively in Liber 1783, folio 294 et seq.; liber 2022 folio 312 et seq.; and liber 2123 folio 86 et seq., all of the Land records of the District of Columbia; and being the same property whereof the grantee therein Thomas Ritter, also known as Thomas T. Ritter, died seized and possessed intestate and without issue on the 21st day of September, 1897, leaving his widow, Ann Catherine Ritter surviving, who died on the third day of March, 1906. That the said Thomas Ritter had one brother named William and one sister named Mary or Mollie, both of whom predeceased said Thomas Ritter, and neither of whom ever married. That the parents of said Thomas,

8 William and Mary Ritter were Emanuel and Jennie Ritter, both of whom predeceased said Thomas Ritter. That the said Emanuel Ritter had two brothers, named respectively Ephraim and J. Frank Ritter, and one sister named Mary Jane (who was sometimes called Loss or Laws Ritter). That said Ephraim Ritter had two children named John Rufus Ritter and Enoch Ritter, both of whom predeceased said Thomas Ritter and neither of whom married, that said J. Frank Ritter also predeceased said Thomas Ritter, and himself survived his wife who died at childbirth, after bearing an unnamed child who died at the same time with its mother. That the said Mary Jane Ritter married Charles G. Griffin by whom she had eight children named as follows: Albert Jerome, Charles Edward, William Harrison, Charles William, Lydie Rebecca, Mary Virginia, Catherine M. P. and Walter N. S. Griffin, of this number Albert Jerome, Charles Edward, and Walter N. S. Griffin died unmarried and intestate. The said Lydia Rebecca Griffin married Emil Bayha; and the said Catherine M. P. Griffin married George Buck. In and upon the following trusts, nevertheless, that is to say: First, to perfect the title to said property by acquiring adverse outstanding claims or encumbrances thereon, second, to sell the same at private or public sale, as the interests of the parties of the first part shall be best subserved by either mode of transfer; and to convey same in fee simple, to the purchaser, who shall not be obliged to see to the application of the purchase money. Third, to pay from the proceeds of the sale, any legitimate debts or claims on, or against said property or the estate of said Thomas Ritter. Fourth, to reimburse the heirs of

9 Ann Catherine Ritter for advances made by some of them to the party herein of the second part, for the purpose of perfecting the title to the herein described property. Fifth, to reserve

to the party of the second part as compensation for making said sale, a commission of five (5) per centum on the amount of said sale. Sixth, to reserve to the party of the second part, as compensation for perfecting said title, removing clouds therefrom or obstacles to the sale thereof, and for legal services rendered, and to be rendered in the adjustment of the estate of said Thomas Ritter, deceased, a commission of ten (10) per centum on the amount of said sale. Seventh, to pay over the balance of said purchase money, derived from said sale to the parties of the first part, in equal shares as the sole surviving heirs at law of said Thomas Ritter, after making suitable provision therefrom for reimbursing some of the heirs of said Ann Catherine Ritter for advances made by them for the benefit of the parties herein of the first part, to the party herein of the second part for the purpose of perfecting the title to said property and to acquire adverse claims thereto. And the said parties of the first part covenant that they will warrant specially the property hereby conveyed; that they are seized of the land hereby conveyed; that they have a right to convey said land; that the said party of the second part shall quietly enjoy said land; that they have done no act to encumber said land, and that they will execute such further assurances of said land as may be requisite.

Witness our hands and seals the day and year hereinbefore written.

10

LYDIA R. FAUNCE.	[L. S.]
MARY V. BAYHA.	[L. S.]
CATHERINE M. P. BUCK.	[L. S.]
CHARLES W. GRIFFIN.	[L. S.]
EMMA R. GRIFFIN.	[L. S.]
WILLIAM H. GRIFFIN.	[L. S.]
MARY GRIFFIN.	[L. S.]

In the presence of:

NELLIE M. FINEGAN,

As — W. H. G. and M. G.

CHAS. C. W. IDLER,

As to Lydia R. Faunce and Catherine M. P. Buck.

MICHAEL ROCK, JR.,

As to Charles W. Griffith and Emma R.

ELLA F. BRAMAN,

As to Mary V. Bayha.

Plaintiff further offered in evidence

Deed in fee of the same property from John H. Adriaans, trustee, to Charles Newburgh, dated Feb. 14, 1908, and Recorded Mar. 5, 1908, in Liber 3131, at folio 183 et seq., of the Land Records of the District of Columbia, to which deed as evidence defendants' counsel then and there objected on the ground that no title to said property having vested in Adriaans, as trustee, or otherwise, under the aforesaid deed, from Lydia R. Faunce, and others, none passed by this deed from Adriaans to Newburgh; but said objection was overruled by the Court, and the said deed admitted in evidence; whereupon

counsel for the defendants excepted, and said exception was duly noted on the minutes of the court before the jury retired.

Plaintiff further put in evidence Lease of said property from Mary S. Wilson acting for and on behalf of herself and of Rachel C. Moore, Rosa May Baier, Philip Moore, Josephine E. Clubb, Harry Warner, and Ida R. Towne, they being the only heirs at law of Ann Catherine Ritter, deceased, party of the first part, to one Harry Himelright, party of the second part, dated Feb. 20, 1907, and recorded Feb. 21, 1907, in Liber 3058, at folio 244, of the Land Records of the District of Columbia, for one year from Feb. 20, 1907.

FLOYD E. DAVIS, a witness sworn and examined on behalf of the plaintiff testified, that he had, as agent, collected the rent of said property, until July 23, 1906, when he ceased to act as agent, and gave his check, for the balance remaining in his hands, amounting to fifty some dollars, to Mary S. Wilson; that the property had originally been placed in his charge by Ann Catherine Ritter, the widow of Thomas Ritter, about 1904; that he placed Himelright on the premises as tenant and that the latter continued paying rent to witness until July 23, 1906.

HARRY HIMELRIGHT, on behalf of plaintiff, testified, that he rented said property from Floyd E. Davis, and continued paying rent to him after Mrs. Ritter's death; until Mrs. Wilson told witness to pay the rent to Mr. Adriaans; that he did pay thereafter to Adriaans from July 23, 1906, until Feb. 20, 1907, when Mrs. Wilson directed him to cease payments to Adriaans; that he signed the lease of Feb. 20, 1907, at the instance of Mrs. Wilson, in her presence, and in the presence of Mr. Walter C. English; that he thought Mrs. Wilson had the same right to forbid further payments to Adriaans as to direct them in the first place; that he gave up the house because Adriaans, Newburgh and others bothered him so much.

ALICE C. GRAY, on behalf of plaintiff, testified, that she lived upon premises 1322 6th St., S. W., for 20 months, paying rent to Mrs. Wilson; that Mrs. Wilson put her in possession; that plaintiff came to the house and claimed the property and she notified Mrs. Wilson; that on one occasion Mrs. Wilson and Newburgh met there and, after some words, Mrs. Wilson smacked him; that she (witness) was bothered so much that she got out.

TIMOTHY J. BRODERICK, on behalf of plaintiff, testified that he is the present tenant of said premises and pays rent to Mrs. Wilson; that Newburgh has been to the house to see him and claimed to own the property.

WALTER C. ENGLISH, on behalf of plaintiff, testified, that he and defendants' counsel occupy adjoining offices; that lease to Himelright was signed in his presence at Himelright's residence, and was acknowledged before witness as Notary.

MARY S. WILSON, one of the defendants, called by the plaintiff, testified, that her sister Ann Catherine married Thomas Ritter, and that there was no issue of the marriage; that Thomas Ritter left no will; that her sister Ann Catherine died March 3, 1906; that after her sister's death she searched to ascertain if Thomas Ritter had left any heirs.

Rev. PAUL A. MENZEL, on behalf of plaintiff, testified, that he is the pastor of Concordia Lutheran Church, Washington, D. C., and produced record of the church, showing marriage of "Charles G. Griffin" and "Mary Jane (Ritter) Watson" on December 12, 1858; that he is familiar with the handwriting of Reverend Samuel D. Finckel, who, in December 1858 was Pastor of the same
13 church whereof witness is now the Pastor; and identified as being in his handwriting, the following certificate:

"WASHINGTON, D. C., *Decem.* 12, 1858.

I hereby certify, That on the 12th day of December A. D. 1858, Mr. Charles G. Griffin & Miss Mary Jane Ritter were lawfully united in the bonds of Holy Matrimony.

SAMUEL D. FINCKEL,
Pastor Ger. E. Church."

ANN E. DAVIS, on behalf of plaintiff, testified, that she has lived in Washington 64 years and knew Emanuel, Ephriam, Frank and Loss Ritter; that Loss Ritter married Charles Griffin; that later she removed to Philadelphia; that she does not remember names of her children, except Mrs. Buck whom she has met; that she did not know of a Louise or Louisa Ritter; that Frank Ritter was married; that Ephriam had two children, both of whom are dead, one dying in infancy.

On cross examination, witness testified, that Frank was married three times, and gave the names of the first two wives, but did not know name of the third; that she did not know whether Emanuel's daughter Molly married or not; that she never knew a John Frank Ritter, nor a John Ephriam Ritter; that Emanuel had a son named William, but she had not seen him for twenty or thirty years; that she did not know of Thomas Ritter; that she knew John Rufus Ritter more than thirty years ago but does not know where he went; that Frank Ritter lived on B St. between 21st and 22d, and had no children.

Deaths, and dates thereof, of the following persons, were
14 proved by official death certificates, admitted in evidence:

John Rufus Ritter,	died	March 19, 1876.
Thomas H. Ritter,	"	Sept. 21, 1897.
William Ritter,	"	Oct. 5, 1886.
Frank Ritter,	"	Oct. 21, 1891.

R. STONE JACKSON, on behalf of plaintiff, testified, that he is a clerk in the Treasury Department, assigned for duty with the auditor for the Navy Department, and produced the complete record of a

Claim for Arrears of Pay due by the United States to John Rufus Ritter, at the time of the latter's death, a part whereof consisted of an affidavit of Thomas Ritter filed by Thomas Ritter in the Navy Department, said affidavit being as follows:

"DISTRICT OF COLUMBIA, ss:

Thomas Ritter being first duly sworn upon his oath says that he is the only surviving relative of his cousin, John R. Ritter; that the father of John R. and deponent's father were brothers and that said John R. Ritter has not now and never had any other cousins than deponent nor any nearer relative—except his parents and deponent's father who are now dead. Deponent further says that he is the sole heir at law of said John R. Ritter, he having left neither widow nor child, mother or father, or other relative surviving him.

his
THOMAS x RITTER.
mark

15 Witness:
 JAMES M. C. WALLACH.

Subscribed and sworn to before me this 20th day of July, 1888.

HOWARD M. NORRIS,
Notary Public. [SEAL.]

CHARLES A. DUNNINGTON, on behalf of plaintiff, testified that he is an assistant to the Librarian of Congress, and produced the Washington and Georgetown Directory for the year 1858, in which appears the following "Lydia Ritter, widow of William".

WILLIAM C. TAYLOR, on behalf of plaintiff, testified, that he is Deputy Register of Wills for the District of Columbia, and that the records show no wills of William, Thomas H. or Margaret Ritter on file in that office.

Depositions, de bene esse of James G. Madison, Ann Matilda Griffin and John K. Pfeil, taken during the year 1907 in law cause No. 49512, wherein Lydia R. Faunce, et al., were plaintiffs and Harry Himelright, et al., were defendants, were read in evidence, their substance being as follows:

JAMES G. MADISON, age 67, lived on 14th Street next to Mr. Ritter in vicinity of old canal on B Street from 1862 to 1874; Ritter's first name was Emanuel; never knew of his keeping a store; didn't know his wife's first name; they had three children, William, Mary and Toney; Mr. Ritter died years ago and so did Mrs. Ritter; Will is dead; don't know what became of Mary; Toney is in boat business down at foot of 6th Street; knows Captain Powell, who kept a store at 14th & Ohio Ave.

16 Mrs. ANN MATILDA GRIFFIN, lives at 534 23rd Street, N. W., aged 65 or 66, widow of Charles T. Griffin; he had a brother William; knows Lydia Faunce who lives in Philadelphia; "Q. Who is her mother? A. Mary Jane they call her, don't they? Q. Mary Jane what? A. Ritter." She married my husband's nephew. "Q. Could you tell us something about Mrs. Mary Jane Ritter—do you know anything about her? A. No, sir, I can't tell you anything at all about her." Has seen her time and again across the street but never talked to her; she went to Philadelphia; one of her children is named Harry, one Charles and one Lydia, who is Mrs. Faunce, and Catherine; Mrs. Faunce was in Washington last spring, stayed 2 or 3 days in witness' house; believes she came here after some property; Mary Jane Ritter's husband was Charles G. Griffin; all their children are married; Catherine's married name is Buck; Lyddie's is Faunce; Mary's is Bayha. While Mrs. Faunce was in Washington Mrs. Wilson came to see her and had a conversation with her in my presence; Mrs. Wilson wanted her to divide; not to take it to law, come on and compromise; Mrs. Wilson said she would be willing to take \$600., I believe; Lydia said No, if she didn't get anything fair she didn't want it at all; she wanted all or none; that is what Lydia said; said she would not bother either way.

On cross examination, testified that Mrs. Faunce said she was not going to spend any money about it; that she wasn't going to bother with it any more; admitted having said in an affidavit that
17 woman'- husband's nephew married was Loss Griffin and that that was the only name she knew for her; that Mrs. Wilson brought Mr. Adriaans there to get witness' affidavit when Mrs. Wilson was hunting for heirs of Thomas Ritter.

JOHN K. PFEIL, has lived in neighborhood of 204 22nd St., N. W., since 1852, is 83 years old; moved away, but came back in war times; knew a Ritter family there about that time, they lived on Water Street near 22d Street; knew John Rufus Ritter well; don't know whether he was a sailor or soldier; his father was called Eph; Eph had a brother Frank; one who made boats and broke his neck on 7th Street wharf I think was a brother; don't know whether Eph had a sister; Eph "didn't have no father what I don't know him. Old Eph was a man about 45 years old. That was the father of Rufus, Eph." "Q. Who was the father of Frank? A. That I don't know. I don't know them old people."

J. TYLER POWELL, on behalf of plaintiff, testified, that he was in business at 14th St. and Ohio Ave., from 1862 to 1865; that he knew a Ritter family living in that vicinity; that the father's first name was Emanuel; that he kept a little store on 14th St., between B and C Sts.; thinks there were two children, a boy and a girl. Witness served a paper on Emanuel Ritter, for the Health Department, owing to the insanitary condition of the premises, and on this visit, contracted small pox, which served to impress it indelibly on his memory.

18 ANN REBECCA DOVE, on behalf of plaintiff, testified, that many years ago, there was a family by the name of Ritter in her neighborhood in Washington; knew the old lady, Mrs. Ritter; that she had three boys and a girl, named Frank, Rufus Emanuel and Loss; that one photograph exhibited to witness looks like the Mrs. Ritter whom she knew; and another photograph looked like Loss Ritter; that Mrs. Ritter never spoke of a husband, and witness never heard of her husband; that Rufus was Ephriam Ritter's son, that Ephriam married twice, and had a child by the second wife; that she did not know whether this child married; that she knows less about Emanuel than the others; that the old lady's (Mrs. Ritter) children called her mother; that she never knew of the old lady having a daughter Louise; that she never heard of Thomas or Tony Ritter.

CATHERINE BUCK, on behalf of plaintiff, testified, that she resides in Philadelphia, is 37 years of age; that her mother's name was Mary Jane Ritter, but she was called "Loss" by her father; witness identifies photographs of her mother and grandmother and family Bible containing entries of her mother and father's marriage, births and marriages of their children, father and mother's death, and children's death; these admitted in evidence; that her grandmother was buried in Philadelphia and the grave was marked by a headboard bearing the name "Lydia Ritter, widow of William"; that the following history of her family she had learned from her father and uncle.

19 Her mother's brothers were Ephriam, Emanuel, Frank, and there was a sister Louise; that Ephriam's children were John Rufus and Enoch; Enoch died when a baby; that her father said he often "Twitted Louise with being an old maid"; that he said Louise was dead; that Emanuel's children were Thomas or Tony, William and Mollie; that Tony followed the water; that William had died unmarried; that Mollie was dead and had never married; that Frank is dead; that Frank had one child which died with mother in childbirth. Witness also read from the family Bible, then present in Court, entries in her father's handwriting, recording the successive births of children to her parents, as follows: Albert Jerome Griffin; Charles Edward Griffin; William Harrison Griffin; Charles William Griffin; Lydia R. Faunce; Mary V. Bayha; Catherine M. P. Buck; Walter N. S. Griffin. Witness also read therefrom the deaths of Albert Jerome Griffin, Charles Edward Griffin, and Walter N. S. Griffin, neither of whom ever married. Witness also identified the same paper identified by witness Menzel, as her mother's marriage certificate, which was found in her father's trunk after his death. Witness further testified to the visit of her cousin Rufus to Philadelphia during the Centennial year (1876) and met him in sailor's uniform; that Rufus visited her family, including witness; that none of her family came to Toney's funeral, because they did not hear of it until sometime after his death.

On cross examination, witness denied that she had previously testified, at the trial of another case between the same parties and involving

20 the same issue, that all the information concerning her family had been detailed to her by her mother, and when counsel sought to refresh her recollection by reading from his notes of her testimony at the former trial, and asked her specifically as to each detail of this family history if she had not in each instance repeated that she had learned it from her mother, witness denied that she had so testified.

Witness further testified that she was one of the grantors in the trust deed to Adriaans; that she had received no part of the purchase price involved in the sale by Adriaans to plaintiff; that she had paid no part of the costs of this or any other proceeding for the recovery of the property, and had not agreed to defray or to aid in defraying such costs, and that she was not expected to put up any costs.

WILLIAM H. GRIFFIN, on behalf of plaintiff, testified, that he resides in New Jersey; that his mother was Mary Jane Ritter, and never heard father call her by any other name; that his mother and father are both dead; that Frank Ritter lived with witness' mother; that head-board marking grandmother's grave in Philadelphia, bore the name "Lydia Ritter wife of William Ritter"; that he just remembers grandmother; that she never spoke of her husband; that his mother said grandfather was a carpenter and got killed; that he met Thomas Ritter when he (witness) was nine or ten years of age in Washington on a float at the wharf; that mother told him about Ephriam, Emanuel and Frank and Sister Louise; that Rufus was son of Ephriam and he had a brother Enoch, who died young; heard his mother say Louise never got married; and that Emanuel's children were William, Toney and Mollie; that witness met William when he came here to see Toney and Toney recognized me as his cousin, called me Harry and called Rufus cousin. Heard mother and father both say Mollie was dead and had never married; they also said William died unmarried. That Mary Jane Ritter married Charles G. Griffin in Washington, D. C., and witness resulted from this marriage. That eight other children resulted from the same marriage, to wit: Albert Jerome Griffin; Charles Edward Griffin; Charles William Griffin; Lydia R. Faunce; Mary V. Bayha; Catherine M. P. Buck, and Walter N. S. Griffin. That three of these children, Albert Jerome Griffin, Charles Edward Griffin, and Walter N. S. Griffin, died unmarried.

On cross examination witness testified that his deposition had been taken in Philadelphia on September 10, 1907, in a case between the same parties then pending in this court involving the title to the same property and admitted that he had then testified as follows:

That Thomas Ritter was an uncle of witness; that he did not know the names of the mother of the father of Thomas; that Thomas and Rufus were relatives but he did not know what the relationship was; that he did not know whether Thomas married or not; that he did not know whether Thomas had any sisters or not; that he did not know Thomas and had never seen him; that he had also then testified that he did not know the names of the father and mother of William and Mollie; that he did not know whether Wil-

22 liam had married or whether Mollie had married; that he did not know whose son William was; that his (witness') mother died when he was only twelve years old, "and I got a step-mother, and she never advised us anything about the family history, and my father was not at home much. He was a janitor;" that his mother has been dead about thirty years; that he never heard his mother "speak of any others but Frank"; that he did not know whether or not Frank married; that Frank was a brother of his mother; and that he had never heard of any other brothers or of any sisters of his mother; that he had heard his father and his father's uncle Charles Griffin speak of Ephriam, Emanuel and Molly and Rufus, but was not informed what relation they were to witness; that he doesn't know about their marriages, their children and things like that; that he thinks Emanuel was the father of Rufus; never heard his mother speak of Emanuel.

Witness was then asked by defendant's counsel of his recollection of what his mother and father had told him of the family genealogy was better now than when he gave the above deposition, and he replied that he based his present testimony upon information he had obtained since in talking with various persons, including his brothers and sisters and Mr. Adriaans.

Whereupon counsel for defendants moved the court to strike out the testimony of the witness so far as it related to the genealogy of his mother's relatives on the ground that, as the same was based, not upon declarations of deceased members of his family, nor upon the witness' own knowledge of family tradition, but, upon alleged
23 information obtained by him during the pendency of litigation involving said genealogy, said testimony was incompetent. Which objection was overruled by the court and said testimony was allowed to stand; Whereupon counsel for the defendants excepted, and said exception was duly noted on the minutes of the court before the jury retired.

On re-direct examination, said witness testified that in the same deposition he had also testified that Rufus was witness' cousin; that he knew there was a Mr. Ritter who owned a piece of ground on Sixth street, Southwest in Washington, who was witness' cousin; "There was two boys and a girl, named Tony, Bill, and Mollie;" that he does not know the names of their father or mother; that witness' grandmother was Lydia Rebecca Ritter and he had seen her; that she lived at 312 Harriet Street, at the time of her death, and was buried in Palmer Street Cemetery, in Philadelphia; that her body was afterwards transferred to Peter Hill Cemetery; that there was a wooden headboard on her grave at Palmer Street; that witness never saw his grandfather; "They always told me he was a carpenter and fell off the roof and got killed," and that is how the Ritters came to go to Washington; that John Rufus Ritter died aboard the Tallapoosa; that witness' father sent to Washington for his clothes and money, but the answer came back that another party had got it; that when asked whether Thomas Ritter who owned the property in question here was related to John Rufus Ritter, witness had answered yes, but could not tell what that relationship was, but that as

24 far as he knew they were witness' cousins; that William and Mollie were also cousins to witness; that witness' mother had three brothers, Ephriam, Frank and Thomas; that the family came from up in Philadelphia, and upon the death of his grandfather *there* circumstances became such that they went to Washington; witness was born in Washington; that Rufus said his father and witness' mother were brother and sister; that when asked if his knowledge of Thomas Ritter's relationship to him was not limited to what he had been told by Mr. Adriaans, witness had answered that Mr. Adriaans "didn't tell me that he was a relative of mine. I knowed there were relatives of mine before I ever seen Mr. Adriaans. I was not acquaintd with them."; that Tony and witness bore strong personal resemblance; that Mrs. Wilson, in Washington, gave Tony's picture to witness' sister; that he saw Tony when he was a boy; that Tony was older than witness; that Tony wrote to his kin in Philadelphia, but witness does not have the letters, if any are still in existence; that Tony has not written since Witness' mother died; that Thomas is the one witness calls Tony; that Tony's letters were addressed some to "Aunt Mary" and others to "Uncle Frank"; that letters came from Tony, Will and Rufus; that if Tony had stated to numbers of people during his life time and filed papers in Washington saying that he had no relatives at all, witness would nevertheless still say Tony was his cousin, "I can't help what he knowed, but I know he is my cousin, and Rufus, I will swear is my cousin too"; that witness' father left Washington in 1876; that there was about seven or eight years difference in ages between Tony and witness.

25 The foregoing is the substance of all the plaintiff's evidence. At the close of plaintiff's evidence, the defendants through their counsel, moved the Court to instruct the jury to find a verdict for the defendants, upon the following grounds:

(1) Insufficiency of proof of the marriage of the maternal grandmother of the grantors in the trust deed from Faunce and others to Adriaans, trustee, through whom plaintiff claims title.

(2) Insufficiency of proof of death without issue of William Ritter and Mollie Ritter, the brother and sister of Thomas Ritter.

Which motion the Court overruled, and to the ruling of the Court the defendants by their counsel, then and there excepted, and said exception was duly noted on the minutes of the Court before the jury retired.

Defendants' Testimony.

J. WILMER LATIMER, a witness on behalf of defendants, testified, that he was the attorney for the defendants, at a trial of a case between the same parties, and involving the same issue, before Chief Justice Clabaugh and a jury in Feb. 1909; that, as there was no stenographic report being made of the testimony, he took careful notes of the evidence as it was given; and has those notes before him; that Catherine Buck, a witness on behalf of plaintiff, at the present trial, was also a witness for the plaintiff, at the former trial,

26 and he distinctly recollects, independent of his notes, that said witness then testified that all the information upon which she based her testimony with respect to her mother's family and their history had been told her by her mother; that as she was giving her testimony in chief at said former trial, he insisted that as to each detail she give her source of information, and as she did so, witness entered her statement upon his notes; that he had observed from plaintiff's evidence already in the case the date of Mrs. Buck's birth and the date of her mother's death; that Mrs. Buck was but four years old when her mother died, and intended to argue and afterwards did argue successfully that it was unlikely that a child of that age could remember in detail what her mother had told her of the names and history of persons whom she had never seen; upon referring to his notes, witness testified that Mrs. Buck then testified in substance as follows, with respect to her mother's family:

I heard mother speak of Ephriam, Frank, and Emanuel, and a sister Louisa who, mother said, was dead and that she had died single; mother said Emanuel's wife's name was Jennie; she said that Emanuel and Jennie were both dead; she said that their children were William, Thomas and Mollie; she said William was dead but said nothing as to his marriage; she said Mollie was dead, but didn't say either were married; mother said Thomas was called Tony; she said Ephriam was dead, and that he had two children; she said the children were named John Rufus and Enoch; she said Rufus was dead; never heard mother say about Enoch; heard mother say her father was dead, and died when she was young.

27 That witness upon the close of the plaintiff's case at that trial moved the Court to direct the jury to find a verdict for the defendant, and one of the grounds of said motion was that as the only evidence of several material facts of pedigree was in the testimony of Mrs. Buck, and, as she was thoroughly discredited, the Court could not allow a verdict to be based upon her unsupported testimony.

WALTER C. ENGLISH, a witness on behalf of defendant-, testified that, he is a practicing attorney and has an office adjoining that of J. W. Latimer, the attorney for the defendant-; that at the trial of former case between the same parties, before Chief Justice Clabaugh and a jury, several years ago, which involved the same issue, he was aiding said Latimer by taking long hand notes of the testimony of the witnesses; that he heard the testimony then given by Mrs. Catherine Buck and took notes of the same, which notes he produces; that he distinctly recalls the fact that Mrs. Buck then testified with respect to her mother's family that she had learned the facts about which she was testifying from her mother; that he recalls this distinctly and independently of his notes for the reason that his attention had been called to the previous testimony on behalf of plaintiff showing that she was but four years old when her mother died; that he remembers the point being raised by defendants' counsel in the motion to instruct the jury to find for the defendant- on the ground of insufficient proof by plaintiff to maintain the case.

28 HARRY M. CLABAUGH, Chief Justice of the Supreme Court of the District of Columbia, a witness on behalf of defendants, testified that he presided several years ago at a former trial of a case involving the title to the same property in question in this suit and recalls that Mrs. Buck from Philadelphia then testified that her information as to the family history detailed by her upon the witness stand had been obtained in conversations with her mother and that it afterward appeared, from other evidence on behalf of plaintiff then in the case, that the witness was but four years of age at the time of her mother's death; that, for this and other reasons, he then held that plaintiff had failed in his proof.

The foregoing is the substance of all the testimony offered on behalf of the defendants, and at the close thereof, defendants, through their counsel, renewed their motion to instruct the jury to find for the defendants, upon the same grounds upon which the motion at the close of plaintiff's evidence was based; but the Court overruled said motion, to which ruling the defendants, through their counsel, then and there excepted, and said exception was duly noted on the minutes of the Court before the jury retired.

Whereupon the Court orally summed up the evidence and charged the jury. No exception was taken thereto, and no report thereof made.

And now the defendant Mary S. Wilson prays the Court to sign and seal this its bill of exceptions, and to make the same a part of the record, and the same is accordingly done, now for then, this 15th day of November, 1912.

ASHLEY M. GOULD, *Justice*. [SEAL.]

29

Assignments of Error.

Filed November 18, 1912.

* * * * *

Now comes the defendant Mary S. Wilson, by her attorney, and assigns the following errors of the presiding Justice in the trial of the above entitled cause:

1. In admitting in evidence deed in trust from Lydia R. Faunce and others to John H. Adriaans, trustee, dated December 5, 1903, and recorded March 5, 1908, in Liber 3131, folio — et seq., one of the Land Records of the District of Columbia.

2. In admitting in evidence deed in fee from John H. Adriaans, Trustee, to Charles Newburgh, dated February 14, 1908, and recorded March 5, 1908, in Liber 3131, folio 183 et seq., one of the Land Records of the District of Columbia.

3. In overruling the motion of defendant's counsel to strike out the testimony of the witness William H. Griffin, so far as it related to the genealogy of his mother's relatives, based upon alleged information obtained by him during the pendency of litigation over the property here in question, involving said genealogy.

4. In overruling defendant's motion, made at the close of all the evidence, to instruct the jury to find for the defendant.

5. In submitting to the jury the question of fact as to whether or not Lydia Rebecca Ritter was ever lawfully married, there being no legal and sufficient evidence upon which the existence of such
30 a marriage could be found by the jury.

6. In submitting to the jury the questions of fact as to whether or not Molly (or Mary) Ritter, sister of Thomas Ritter, survived said Thomas Ritter, and is now living, there being no legal and sufficient evidence upon which those facts could be found by the jury.

7. In submitting to the jury the question of fact as to whether or not said Molly (or Mary) Ritter married, there being no legal and sufficient evidence upon which that fact could be found by the jury.

8. In submitting to the jury the questions of fact as to whether or not issue of said Molly (or Mary) Ritter survived said Thomas Ritter, and is now living, there being no legal and sufficient evidence upon which those facts could be found by the jury.

9. In submitting to the jury the question of fact as to whether or not William Ritter, brother of Thomas Ritter, married, there being no legal and sufficient evidence upon which that fact could be found by the jury.

10. In submitting to the jury the questions of fact as to whether or not issue of said William Ritter survived said Thomas Ritter, and is now living, there being no legal and sufficient evidence upon which those facts could be found by the jury.

J. W. LATIMER,
Attorney for Defendant Mary S. Wilson.

31

Designation.

Filed November 18, 1912.

* * * * *

The Clerk will please prepare transcript of record on appeal, in the above entitled case, and include therein the following: Declaration; plea; joinder in issue; memorandum of verdict; judgment, appeal noted and bond fixed; memorandum of appeal bond; memorandum of order of July 12, 1912, extending time for submitting bill of exceptions and filing transcript to September 16, 1912; memorandum of submission of bill of exceptions, September 16, 1912; memorandum of order of September 16, 1912, extending time for filing transcript; memorandum of October 25, 1912, further extending time to file transcript to December 15, 1912; order making bill of exceptions part of record; bill of exceptions; assignment of errors, and this designation.

J. W. LATIMER,
Attorney for Defendant Mary S. Wilson.

John H. Adriaans, Esq., Attorney for Plaintiff, 612 F St. N. W.,
Washington, D. C.

DEAR SIR: Please take notice that I have, on this 18th day of
November, 1912, filed with the Clerk of the Court, the above design-
nation of record on appeal.

J. W. LATIMER,
Attorney for Defendant Mary S. Wilson.

32 *Abstract from Rough Notes of Circuit Court No. 2.*

FRIDAY, July 12, 1912.

* * * * * * *

52884.

NEWBURG

v.

WARDER.

Time to submit Bill of Exceptions & to file transcript extended to
Sep. 12/12 inclusive.

*Affidavit of J. H. Adriaans as to Extension of Time for Filing
Transcript.*

Filed October 4, 1912

* * * * * * *

John H. Adriaans being duly sworn deposes and says that he is
one of the attorneys for the plaintiff; that he was served by J. W.
Latimer, attorney for defendant Wilson, with a motion returnable
July 12, 1912 to extend the time for filing the transcript of record
herein in the Court of Appeals; an order of Court passed on that
day, with consent of affiant, granted said extension to expire Sep-
tember 12, 1912; that the daybook, the docket and the minutes of
the Court all agreed as to said terminal date of September 12, 1912;
that subsequently without notice to, or knowledge of, affiant the
entries on the docket and minutes were altered by erasing the "2"
and substituting a "6"; that subsequently a new motion for fur-
ther extension was served on affiant, returnable September 16, 1912;
affiant called the attention of the Chief Justice, then presid-
ing, to this alteration; that it was then explained by Mr J. W.
33 Latimer to the Chief Justice that the alteration had been
made in his absence and it was presumably procured by his asso-
ciate Mr. English, who was then absent from the City; the Chief
Justice thereupon passed an order further extending such time until
November 1, 1912 conditionally upon Mr. English explaining such
alteration satisfactorily to the Court.

JOHN H. ADRIAANS.

Sworn to and subscribed before me, this 4th day of October, 1912.

JOHN R. YOUNG, *Clerk*,
By A. W. LEVINSALER, *Ass't Cl'k*.

Motion to Amend Records of Court.

Filed October 14, 1912.

* * * * *

Now comes the plaintiff and moves the Court to amend, and restore, its records so that the entry, in the docket and minutes, of the Court, of an order passed herein July 12, 1912, will show that thereby extension of time was given defendant Wilson to file her transcript of record in the Court of Appeals until September 12, 1912.

J. H. ADRIAANS,
Attorney for Plaintiff.

Affidavit in Support of Motion.

John H. Adriaans being duly sworn deposes and says that he is one of the attorneys for the plaintiff; that the attorney for
34 the defendant, J. W. Latimer, served affiant with a copy of a motion for extension of time to file the transcript of record herein returnable July 12, 1912; that on said day, with assent of affiant, the Court granted such extension until September 12, 1912; that affiant was subsequently served with a similar motion for a further extension by said J. W. Latimer, returnable September 16, 1912; that intermediately between said dates, at a time unknown to affiant, an alteration of the docket and minutes of the Court was made, so that "September 12" read "September 16"; that this change was not made with the knowledge and consent of affiant; that when affiant called this alteration of the records to the attention of the Court, on September 16, 1912, the Chief Justice then presiding stated he would pass a conditional order granting a further extension until November 1, 1912 if the alteration was satisfactorily explained upon reconvening of the Court by defendant Wilson or her attorneys.

JOHN H. ADRIAANS.

Sworn to and subscribed before me this 14th day of October, 1912.

[SEAL.]

WM. J. NEALE,
Notary Public, D. C.

To J. W. Latimer, Esq., Attorney for Defendant Wilson:

Take notice hereby that the above motion has been calendared in Circuit Court for hearing on the 18th day of October, 1912, at 10 a. m.

J. H. ADRIAANS,
Attorney for Plaintiff.

35 Service of copy acknowledged this 14th day of October, 1912.

J. W. LATIMER,
Att'y for Def't Wilson.

Supreme Court of the District of Columbia.

FRIDAY, *October 25th*, 1912.

Session resumed pursuant to adjournment, Hon. Daniel Thew Wright, Justice presiding.

* * * * *

By Justice Anderson.

Upon consideration of the motion of plaintiff to correct or restore the record herein, the affidavit of John H. Adriaans, in support thereof, and the affidavits of Fred. C. O'Connell, Walter C. English and J. Wilmer Latimer in opposition thereto, after argument by counsel, it is, by the court, this 25th day of October 1912, adjudged and ordered that said motion be, and the same hereby is overruled, with costs against the plaintiff.

Additional Designation of Record on Appeal.

Filed November 20, 1912.

* * * * *

The Clerk will please add to the record, as designated by defendant Wilson, the following parts of the record in this cause:

36 1. Memorandum of order of July 12, 1912 (as contained in Rough Notes of Circuit Court No. 2, Pages 140-141) extending time for submitting bill of exceptions and filing transcript to September 12, 1912.

2. Affidavit filed October 4, 1912.

3. Motion to amend record, and supporting affidavit, filed October 14, 1912.

4. Order of October 25, 1912, overruling motion of October 14, 1912.

J. H. ADRIAANS,
Attorney for Plaintiff.

I, John R. Young, Clerk of the Supreme Court of the District of Columbia, hereby certify the foregoing pages numbered from 1 to 36, both inclusive, to be a true and correct transcript of the record,

according to directions of counsel herein filed, copies of which are made part of this transcript, in cause No. 52884 at Law, wherein Charles Newburgh is Plaintiff and George E. Warder, et al. are Defendants, as the same remains upon the files and of record in said Court.

In testimony whereof, I hereunto subscribe my name and affix the seal of said Court, at the City of Washington, in said District, this 2d day of December, 1912.

[Seal Supreme Court of the District of Columbia.]

JOHN R. YOUNG, *Clerk*.

Endorsed on cover: District of Columbia Supreme Court. No. 2489. George E. Warder et al., appellants, vs. Charles Newburgh. Court of Appeals, District of Columbia. Filed Dec. 10, 1912. Henry W. Hodges, clerk.

JAN-13-1913

Henry W. Hodges
Plaintiff

Court of Appeals, District of Columbia.

JANUARY TERM, 1913.

No. 2489.

GEORGE E. WARDER, FRANK WARDER, ELLA
C. GRAY, AND MARY S. WILSON, APPELLANTS,

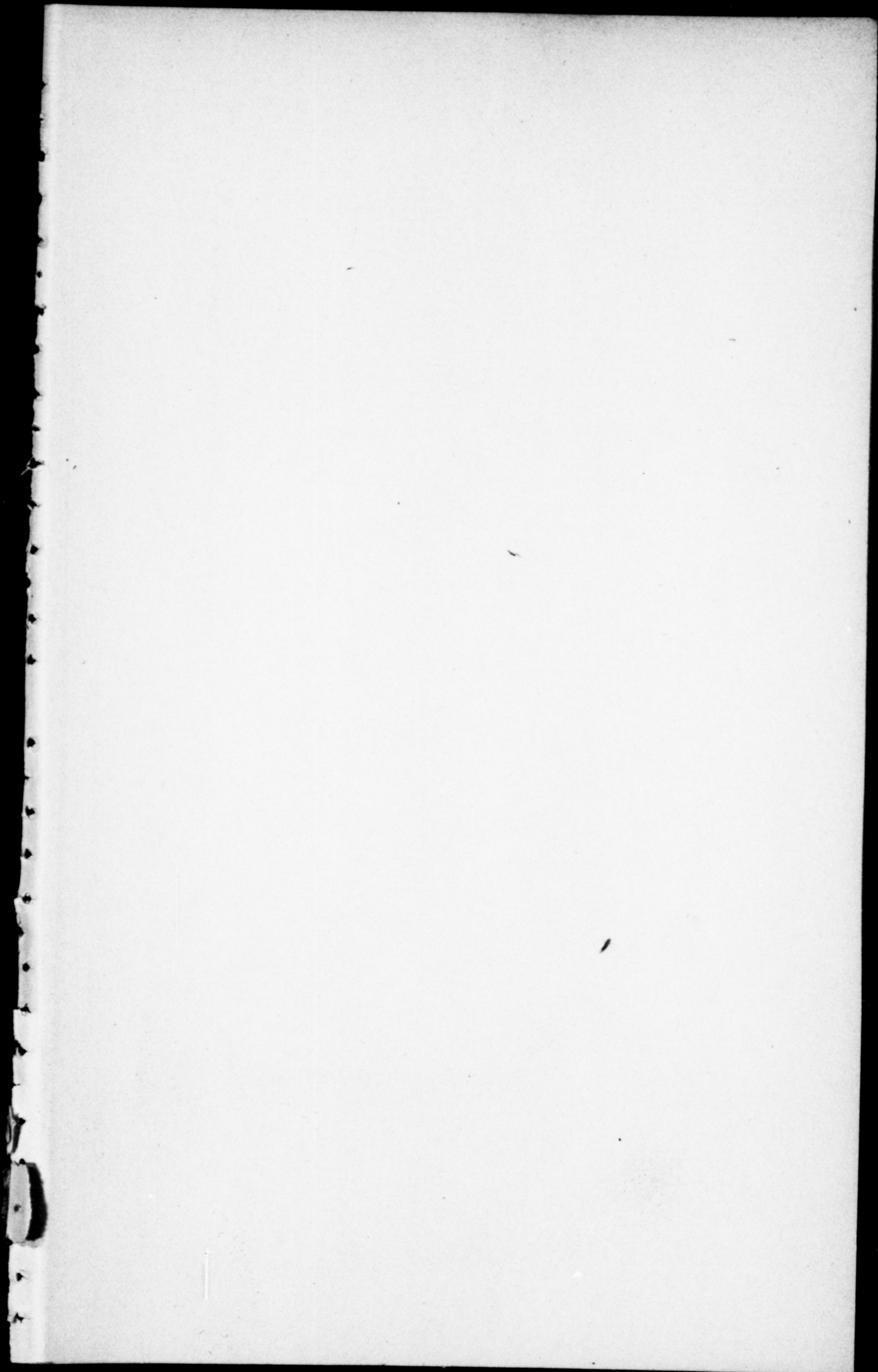
vs.

CHARLES NEWBURGH.

BRIEF FOR APPELLANTS.

J. WILMER LATIMER,

Attorney for Appellants.



Court of Appeals, District of Columbia.

JANUARY TERM, 1913.

No. 2489.

GEORGE E. WARDER, FRANK WARDER, ELLA
C. GRAY, AND MARY S. WILSON, APPELLANTS,

vs.

CHARLES NEWBURGH.

BRIEF FOR APPELLANTS.

Appeal by defendants below from a judgment in ejectment for possession.

The first three of the above-named appellants were the tenants of appellant Wilson, and have no substantial interest in this appeal. For this reason said Wilson alone is hereinafter referred to as "appellant."

Questions for Decision.

(1) The validity of two deeds constituting appellee's chain of title.

(2) The competency of certain testimony to prove pedigree.

Statement of the Case.

Thomas Ritter (commonly known as Tony Ritter), the alleged common source of title, died in 1897 (Rec., p. 9) seized and possessed of the property in question, intestate, and without issue (Rec., p. 4). His widow, until her death, and afterwards appellant, as one of her heirs, remained continuously in possession from 1897 until the judgment was entered below (Rec., p. 7).

DEEDS UNDER WHICH APPELLEE CLAIMS.

In December, 1906, certain persons, styling themselves "sole surviving heirs at law of Thomas Ritter," executed a deed to John H. Adriaans, an attorney at law, pretending to convey this property to him *in trust to perfect the title and to remove clouds therefrom and obstacles to the sale thereof*. After executing these trusts it was further provided that he should sell the property and retain 15 per cent of the sale price as compensation for his legal and other services (Rec., pp. 4, 5, 6). The alleged heirs do not undertake to defray any of the costs and expenses of the attorney-grantee. Moreover, the evidence affirmatively shows that they were not to be at any expense whatsoever in the matter (Rec., pp. 10, 12).

Mr. Adriaans deeded the property to appellee February 14, 1908 (Rec., p. 6). This deed and the above trust deed to Adriaans were recorded on the same day, March 5, 1908 (Rec., pp. 4, 6). Shortly afterwards an ejectment proceeding was commenced against appellant and others in appellee's name (Rec., p. 14). At the trial of this case plaintiff failed in his proof (Rec., p. 16), and later the present suit was commenced.

BROTHER AND SISTER OF PROPOSITUS.

Thomas Ritter had one brother, William, and one sister, Mary (or Mollie) (Rec., p. 9). The record shows that William is dead (Rec., p. 8), but the only evidence as to whether or not he married or left issue, and as to whether or not Mary is dead, unmarried and without issue, is that of William H. Griffin and Catharine Buck, two of the alleged heirs, each of whom attempted to prove that William and Mary had died unmarried and without issue (Rec., pp. 11, 12).

WILLIAM H. GRIFFIN'S TESTIMONY.

Upon direct examination this witness testified that he had *heard his mother and father both say Mollie was dead, and died unmarried; also that William died unmarried, and that Thomas, William, and Mollie were children of Emanuel Ritter* (Rec., p. 12). On cross-examination, he admitted (Rec., pp. 12, 13) that, in his deposition taken in Philadelphia in September, 1907, in a case between the same parties involving the title to the same property, he had testified that he *did not know the names of the father and mother of Thomas or of William or of Mollie; that he did not know whether Thomas had any sisters or not; that he did not know whether William had married, or whether Mollie had married; that he doesn't know about their marriages, their children, and things like that; that his mother had been dead about thirty years, died when he was 12 years old; that he never heard his mother speak "of any other but Frank"; that witness' stepmother "never advised us anything about the family history," and that his "father was a janitor, and was not home much."*

Upon being asked if his recollection of what his father and mother told him of the family genealogy was better now than when he gave that deposition, he replied that he

based *his present testimony upon information he had obtained since giving that deposition, in talking with various persons; including his brothers and sisters, and Mr. Adriaans* (Rec., p. 13).

CATHARINE BUCK'S TESTIMONY.

Upon direct examination this witness testified in detail as to the genealogy of her mother's alleged relatives, stating that she based her testimony as to William and Mollie Ritter (and others whom she had never known) *wholly upon what her father and uncle had told her* (Rec., p. 11). On cross-examination she denied that, at a previous trial, she had stated repeatedly that her entire information upon the subject had been received *in conversations with her mother* (Rec., pp. 11, 12).

Three witnesses for the appellant, Chief Justice Clabaugh (Rec., p. 16), who presided at the former trial; and Walter C. English (Rec., p. 15) and J. W. Latimer (Rec., p. 14), (both of whom, because no stenographer was present, had taken and preserved careful notes of the testimony given at that trial) testified that said witness, when interrogated as to the genealogy of her mother's family, was asked to state, in answer to each question relating to the births, marriages, and deaths of the various members, the source of her information, and that in every instance she testified that she was stating what her *mother* had told her; that plaintiff's evidence then before the jury showed that her mother had *died when this witness was four years old*; that one of the grounds upon which the court declined to submit that case to the jury was because proof of several material facts depended upon the unsupported testimony of this witness, and she was thoroughly discredited by plaintiff's own case as **made.**

Assignment of Errors.

The trial court erred, it is respectfully submitted, in the following particulars:

I. In admitting in evidence deed in trust from Lydia R. Faunce and others to John H. Adriaans, trustee, dated December 5, 1906, and recorded March 5, 1908.

II. In admitting in evidence deed in fee from John H. Adriaans, trustee, to Charles Newburgh, dated February 14, 1908, and recorded March 5, 1908.

III. In overruling the motion of defendant's counsel to strike out the testimony of the witness William H. Griffin, so far as it related to the genealogy of his mother's relatives, based upon alleged information obtained by him during the pendency of litigation over the property here in question, involving said genealogy.

ARGUMENT.

Trust Deed to Adriaans was Void.

The first and second assignments may be considered together.

Appellant objected to the admission of the Faunce-Adriaans trust deed on the ground that it was champertous and therefore void as against public policy (Rec., p. 4), and to the admission of the Adriaans-Newburgh deed on the ground that, as Adriaans took no title to the property, no title passed to appellee (Rec., p. 6). These objections were overruled and both deeds admitted in evidence (Rec., pp. 4, 6).

Manifestly, if the trust deed to Adriaans was void, the pretended conveyance by him, as trustee thereunder, to appellee, Newburgh, was likewise void.

At the time the trust deed to Adriaans was executed the grantors were not, and had never been, in possession of the property, but the same was then, and continued to be until the judgment was entered below (nearly six years later), in the possession of the appellant under a claim of ownership in herself and her brothers and sisters (Rec., p. 7); and Thomas Ritter, whose heirs these grantors alleged themselves to be, had been dead more than nine years when said deed was made (Rec., p. 8).

The legal effect of this trust deed was to divest the grantors absolutely of whatever title they had and to vest the same in their attorney, who thereby undertook to enforce their claim upon his own account and in any manner he might deem necessary or expedient; and, if he should meet with success, his compensation should be a portion of what he recovered, while if he failed he was to receive nothing—not even the costs and expenses to which he had been put.

Such an agreement this court has held to be obnoxious to the law against champerty, and therefore void, in a case

almost identical with the present. *Peck vs. Heurich*, 6 App. D. C., 273 (affirmed, 167 U. S., 624).

That, too, was an action of ejectment, in which, as in the present case, the questionable deed was a necessary link in the plaintiff's chain of title. Its admissibility was opposed upon the same ground as the objection to this deed was based. The objection there was sustained, and a verdict for the defendant directed. The judgment was affirmed by this court and by the Supreme Court of the United States, the latter substantially adopting this court's opinion as its opinion in the case. At page 284 Mr. Justice Morris, speaking for this court, said:

"We must regard an agreement by an attorney to undertake the conduct of a litigation on his own account, to pay the costs and expenses thereof, and to receive as his compensation a portion of the proceeds of the recovery or of the thing in dispute as obnoxious to the law against champerty. And that this was the character of the arrangement in the present case, we are entirely satisfied.

"The very thing in dispute was conveyed or sought to be conveyed, in advance to the attorney and an associate for the express purpose of enabling the attorney to conduct the litigation on his own account and at his own cost and expense; and in consideration of this, he was to retain, at the end of the litigation, one-third of what had been conveyed to him, and was to account to his clients for the other two-thirds. This was certainly an agreement on his part to take as his compensation a part of the thing in dispute; and it does not alter the case at all that the land, when recovered, was to be sold. That was only the practical mode for a division of proceeds between the parties to the enterprise."

Because there is some difference between the language employed in the present deed and that of the deed in the above case, the trial justice held that this deed did not come within that decision. But we submit that the difference is only verbal, and that the deeds in the two cases are so simi-

lar in their purpose and legal effect as to make that decision controlling here.

It may be argued by appellee that the present deed contains no agreement by the grantee, Mr. Adriaans, to conduct a litigation, and therefore is not champertous. We submit that it does contain such an agreement. It is not frankly set forth in express language as it was in the Peck-Heurich deed, and *that decision may have been the reason* the present agreement was not similarly expressed. But if the intent and legal effect of this deed was that Mr. Adriaans should have, and he thereby assumed, the same power, authority, and discretion, and was charged with the same duty, as the attorney-grantee in that case, the fact that the purpose of the conveyance was set forth with less frankness will probably not induce a determination in its favor.

What was it Mr. Adriaans thereby undertook to do? He was, "First, to perfect the title to said property by acquiring adverse outstanding claims or encumbrances thereon" (Rec., p. 5). This is not very definite, and if this were all there might perhaps be some doubt as to whether a litigation was what the parties had in mind. But in the same instrument the parties themselves explain the meaning of that clause. When they reach the question of the compensation the attorney-grantee is to receive for his services, it appears more clearly what services he was expected to render: "Sixth, to reserve to the party of the second part, as compensation for perfecting said title, removing clouds therefrom or *obstacles to the sale thereof, and for legal services,*" a percentage of the gross proceeds (Rec., p. 6).

It is unnecessary to consider whether his agreement to perfect the title and to remove clouds was not of itself an undertaking on his part to bring suit if necessary to accomplish those objects. It might, with much reason, be so argued. But he went further, and expressly *agreed to remove the obstacles standing in the way of a sale.*

What were these obstacles? The answer, and the only

answer to be found in the record, is appellant's adverse possession and claim of ownership.

It cannot be seriously contended that appellant's possession was not adverse, for, not only does the record show that it was (Rec., p. 7), but the deed itself indicates, in the first clause quoted above, that the parties recognized there was *some* adverse claim. It must have been appellant's claim which they had in mind and there referred to. The record shows no other; and if there had been any other claim constituting a cloud upon the title, it would necessarily have appeared at the trial. If appellee's title had not been clear, except for appellant's possession, that of itself would have prevented a judgment in his favor, for the right to recover in ejectment depends always upon plaintiff's establishing affirmatively a clear title in himself.

This appellant, therefore, was the obstacle to the sale which the attorney-grantee undertook to remove, and she must also have constituted the "cloud" and the "adverse claim" referred to in the deed. Hence we submit that a suit to remove appellant was what the parties had in mind and was the very object of this conveyance. And such a suit was filed shortly afterwards (Rec., p. 12); later another (Rec., p. 14), and later still the present one.

In *Hamilton vs. Gray*, 67 Vt., 233, the contract contained *no express agreement to bring suit*, nor did it expressly confer the right to sue, and the court said (page 236):

"It is argued by the plaintiff that the subject-matter of a champertous agreement must be a suit, or that one must be in contemplation. Conceding this to be true, we think a suit to enforce the claims fairly *within the contemplation of the parties to the agreement*. The plaintiff took the claims for collection, and under the agreement he *had the right to bring suits*, if necessary, to collect the claims, and it is fair to infer the parties had in mind that in the collection of a large number of evidently poor, and some outlawed, claims, suits would become necessary." (Italics ours.)

Certainly Mr. Adriaans had the right to bring suit. And it is fair to infer that the parties to the present contract had in mind that in executing the trusts thereby granted and assumed suit would become necessary.

This inference is supported by the fact mentioned above, that three successive suits to recover the property from appellant have been instituted since the deed to Adriaans was made,—the first one very shortly afterwards. And it may also be observed that if these grantors were the lawful heirs of Thomas Ritter, they became entitled to the possession of this property immediately upon his death in 1897, yet no steps whatsoever were taken to establish title in them until nine years later, when Attorney Adriaans undertook by this trust deed to enforce a claim which, so far as appears, they had *never even asserted before that time*.

This trust deed does not expressly provide who should pay the costs and expenses to be incurred by the attorney-grantee, but it appears from the record that the *grantors were not to pay them*. According to the evidence offered by appellee, one of the alleged heirs said she was not going to spend any money about the property (Rec., p. 10), and another, that she had paid no part of the costs of this or any other proceeding, and had not agreed to pay any (Rec., p. 12). Yet it may be argued in behalf of appellee, that because there was no *express* stipulation by Mr. Adriaans to pay or advance the costs and expenses, the court would not be justified in holding such to have been his agreement.

But no express covenant was necessary, we submit, if that was the natural result of the contract. If Mr. Adriaans was not to pay the costs and expenses, who was? The contract does not provide that expenses of any kind are to be paid by the alleged heirs, or even charged against their interest; and if such had been the agreement, it would most certainly have been set forth. The attorney-grantee would have insisted, when assuming a trust of this character, that it should clearly appear that the costs and expenses necessarily inci-

dent to his execution of the trusts, and for which he would be primarily liable, were *not* to be borne by him, but by the grantors, if that had, in reality, been the agreement between them.

The same point was urged in the attempt to uphold the deed in the Peck-Heurich case, *supra*, and was thus effectually answered by this court (pages 284, 285):

"There was considerable argument on behalf of the appellants expended in an attempt to show that the deed, which contained the agreement of the parties, did not expressly provide for the payment of the costs and expenses of the litigation by the attorney; and that he might be regarded as advancing the costs in the shape of a loan to his clients. *It may be admitted that the contract contains no express covenant that the attorney shall pay the costs of litigation. But no express covenant for that purpose is required, if that was the necessary result of the contract.* The title, so far as the clients had title to convey, was vested in the attorney and his co-trustee for the express purpose of instituting suits in their own names and in their own rights; and if the contract were wholly silent on the subject, the plain inference would be that they should pay the costs and expenses. Costs and expenses were to be paid; costs and expenses, we presume were paid; and plaintiffs are primarily liable for such costs and expenses." (Italics ours.)

But by many authorities it is not considered an essential element of champerty that there should be an agreement, express or implied, by the champertor, to pay costs. *Stanton vs. Haskin*, 1 MacA., 558; *Scobey vs. Ross*, 13 Ind., 117; *Lathrop vs. Amherst Bank*, 9 Metc., 489; *Backus vs. Byron*, 4 Mich., 535; 6 Cyc., 859, note 40.

It probably will not be questioned that whatever suits were necessary would have to be instituted in the name of the trustee. Manifestly they could not be brought in the grantors' names. They had parted with whatever title they had

and vested the same in their attorney. And the pretended conveyance by Adriaans to appellee did not alter the situation. If this conveyance was effective for any purpose it was only to substitute the latter as trustee, and consequently, as plaintiff in the suit, in place of the former. Adriaans' trust being *primarily* to perfect the title to the property by removing clouds therefrom and obstacles to the sale thereof, he was without authority to sell until those trusts were fully executed. The power to sell was merely an incident to the main trust, the execution of which was a condition precedent to his exercise of this incidental power. The sale of the property was simply the means provided for dividing it among the grantors and grantee after it was recovered.

Adriaans and all persons dealing with him were strictly bound by the terms of his trust. And, as he had not executed the trust—nor in fact done anything to perfect the title or to remove clouds therefrom or obstacles to the sale—as his grantee was bound to know, such grantee took any title Adriaans may have had charged with that trust. So that if the conveyance by Adriaans to Newburgh, appellee, could have any effect, it would be to substitute him as trustee in place of Adriaans. 1 Perry on Trusts (6th ed.), sec. 217.

It is submitted that this trust deed to Adriaans and the trust deed in the Peck-Heurich case, *supra*, are so nearly identical in their intent and legal effect that the rule applied in that case is equally applicable here.

Pedigree Testimony of William H. Griffin Was Incompetent.

The third assignment of error relates to the refusal of the trial court to strike out the testimony of this witness upon the issues of the births, marriages and deaths of his mother's alleged relatives who would take in preference to himself and the other grantors to Adriaans.

On cross-examination the witness stated (Rec., p. 13) that the information upon which he based such testimony was acquired *in talking with various persons, including his brothers and sisters and Mr. Adriaans, since litigation over this property was begun.* Counsel for appellant thereupon moved to strike out so much of his testimony as related to these genealogical facts on the ground that, not being based upon declarations of deceased members of the family, nor upon the witness' own knowledge of family tradition, but upon alleged information obtained by him during the pendency of litigation involving said genealogy, the same was incompetent (Rec., p. 13).

The recognized exception to the hearsay evidence rule which permits hearsay upon questions of pedigree restricts such evidence to declarations of deceased members of the family made before the controversy arose. 16 Cyc., 1228, 1231, and cases cited.

It is thus stated in Jones on Evidence, 2d ed., sec. 312:

"The declarations of *deceased persons* may be received * * * when such declarations refer to the age, relationship, birth, marriage, death or legitimacy of persons *legally related by blood or marriage to the declarant.* But the declarations must have been made *before the controversy* in relation to which they are to be proved arose".

(See also sec. 318.)

This witness' testimony does not come within the exception for three reasons, any one of which alone would render his testimony incompetent:

First, the witness does not pretend to relate declarations of *deceased persons*;

Second, the alleged declarations were not made *before the controversy arose*; and,

Third, his testimony, to an extent not disclosed, was based upon the declarations of Mr. Adriaans, a person *wholly unrelated to the family*, and of *other persons not named at all.*

The prejudicial effect of allowing this testimony to be considered by the jury will appear from what follows.

For proof of the extinction of those lines of descent entitled to take in preference to these alleged heirs, appellee depended solely upon this incompetent testimony and the testimony of this witness' sister, Catharine Buck, to be presently referred to.

Appellee was put upon proof of his own title, and upon its strength alone depended his right to recover. *Posey vs. Hanson*, 10 App. D. C., 496, 504, where this court says:

"It was incumbent upon the lessors of the plaintiff claiming as they do by collateral descent, to * * * prove all the different links in the chain of descent, which will show that the persons last seized and the claimants descended from some common ancestor, together with the extinction of all those lines of descent which claim in preference to the lessors of the plaintiff. They must prove the marriages, births and deaths; and the identity of persons necessary to fix title upon themselves to the exclusion of others who would have, if in existence, a better title to the land sought to be recovered."

And, at page 505:

"The plaintiff must remove every possibility of title in another person in the line of descent before he can recover; no presumption being admitted against the person in possession."

The propositus in the present case, Thomas Ritter, had one brother, William, and one sister, Mary (Rec., p. 9), who were children during the civil war (Rec., p. 10), and hence it would seem that there ought to be many persons living who could testify of their own knowledge with respect to them; yet the only evidence as to whether William married and had issue, and as to whether Mary is dead, unmarried and without issue, is the testimony referred to above of two of the claimants, William H. Griffin and Catharine

Buck. Neither pretends to have personal knowledge of the facts, but testify to alleged statements of others to the effect that said William and Mollie both died unmarried and without issue.

The witness Catharine Buck was so discredited that it is improbable, to say the least, that the jury would have found such facts upon her testimony alone.

CATHARINE BUCK'S TESTIMONY.

This witness testified, upon direct examination, that her information with respect to William and Mary Ritter, and of the others whom she had not personally known, was acquired from her FATHER and UNCLE (Rec., p. 11). On cross-examination she denied repeatedly that, at the former trial, she had testified explicitly that all of her knowledge as to these persons had come to her in conversations with her MOTHER (Rec., pp. 11, 12).

Three witnesses, including the justice who presided, say (Rec., pp. 14, 15, 16) that, at the previous trial, this witness testified in great detail in respect to the births, marriages, and deaths of persons whom she had never herself known, including William and Mary Ritter, and that she then stated and separately repeated as to each of these persons that *her knowledge was acquired wholly from conversations with her mother*. All three of these witnesses further testified that plaintiff's own evidence, at that trial, disclosed that the *mother of said witness died when the witness was four years old*, and that this was called to the attention of the justice then presiding, who, because proof of material facts of pedigree rested solely upon this witness' uncorroborated testimony, and for other reasons, declined to submit that case to the jury.

At the trial of the present case, the only corroboration of this witness was the testimony of the witness Griffin, above referred to, which, we submit, was no evidence at all. Yet

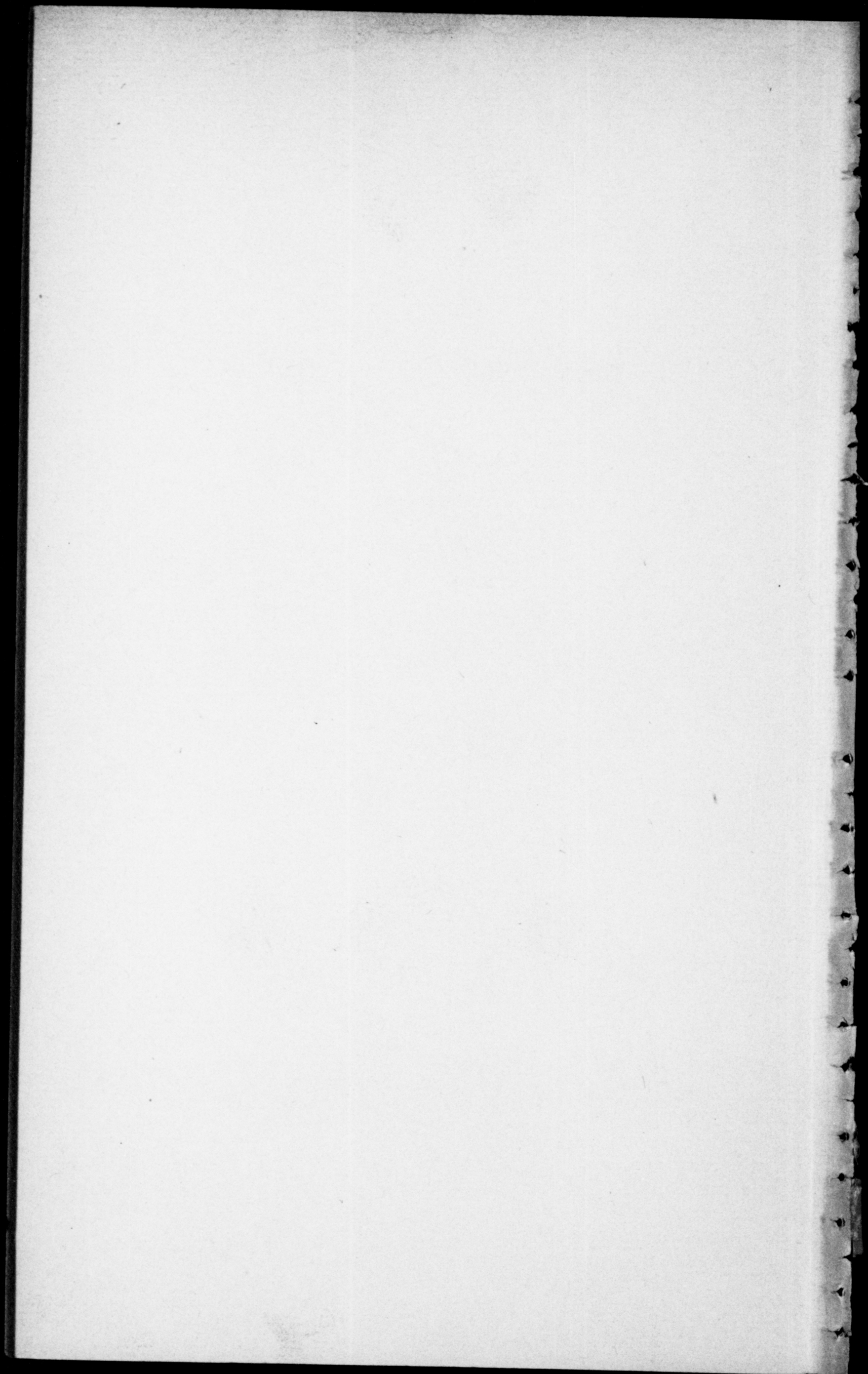
the jury were allowed to treat it as evidence, and they must necessarily have found the extinction of these nearer lines of descent, either *upon Griffin's testimony alone*, disregarding Mrs. Buck's testimony, or upon her testimony *because corroborated by Griffin*. In either case the error of the court in not excluding the testimony of Griffin was equally prejudicial to appellant.

Conclusion.

It is respectfully submitted that the court below erred in admitting in evidence the trust deed from Faunce and others to Adriaans, and the subsequent deed from Adriaans to appellee; and in overruling appellant's motion to strike out the pedigree testimony of the witness Griffin; and that for these reasons the judgment below should be reversed.

J. WILMER LATIMER,

Attorney for Appellants.



FEB 3 - 1913

Henry C. Adger
Chas. H.

IN THE

Court of Appeals, District of Columbia.

JANUARY TERM, 1913.

No. 2489.

GEORGE E. WARDER ET AL.

vs.

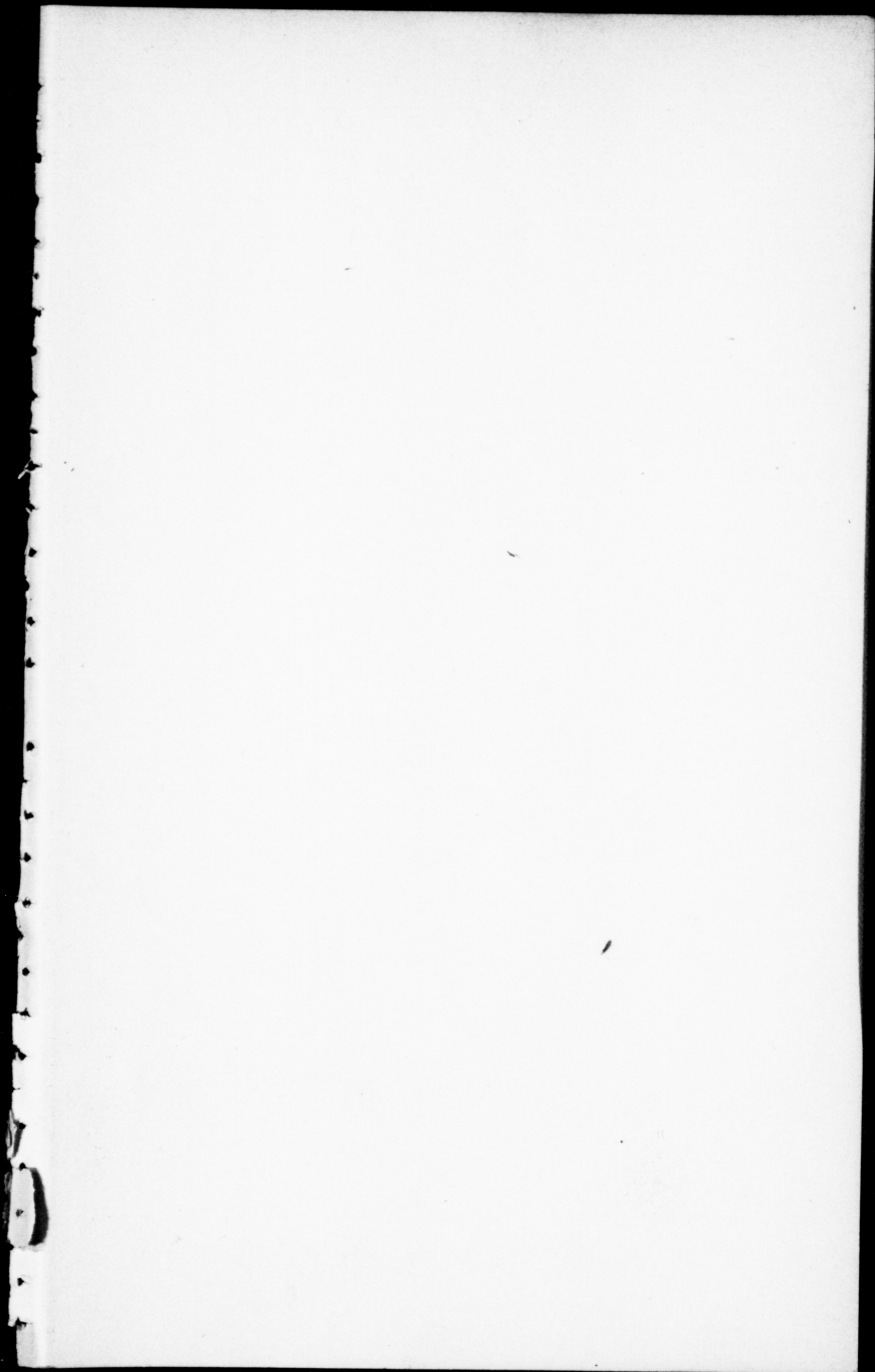
CHARLES NEWBURGH

APPELLEE'S BRIEF.

W. A. HENDERSON,

J. H. ADRIAANS,

Counsel for Appellee.



IN THE
Court of Appeals, District of Columbia.

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CHARLES NEWBURGH.

APPELLEE'S BRIEF.

Statement of the Case.

One Thomas Ritter acquired at different times three adjacent portions of lots 15 and 16, in square 503, in the city of Washington, D. C., which portions are aggregately described correctly in a deed to appellee (Rec., p. 6). He died accidentally by drowning in said city September 21, 1897 (Rec., p. 8), intestate and without issue, leaving said unincumbered property undisposed of. His widow, Ann Catherine Ritter, died March 3, 1906 (Rec., p. 8). The widow

continued to live upon the property (1322 Sixth street southwest) from 1897 until 1904. Mrs. Ritter then entrusted the property for rental purposes to Floyd E. Davis, a real estate agent in said city (Rec., p. 7). The latter placed one Harry Himelright on the premises as tenant, paying over the rents so collected to the widow (Rec., p. 7). Under these circumstances the widow died in 1906.

Mrs. Wilson advised the tenant, Himelright, to change payment of rental from Floyd E. Davis to J. H. Adriaans, which said tenant continued to pay from July 23, 1906, until February 20, 1907 (Rec., p. 7); on which latter date Mrs. Wilson induced said tenant to sign a lease with her as landlord (Rec., p. 7), and she continued to collect rent thereunder from successive tenants, including the Warders, until a writ of restitution was issued to plaintiff in this cause on the 18th day of July, 1912.

By inspection of the assignment of errors (Rec., pp. 16, 17) it will appear that each of the ten objections to the judgment appealed from is based purely upon technical aspects of the evidence offered by plaintiff to establish the right to the possession.

Taking up these errors assigned, seriatim, the following answers are submitted thereto.

Assignment of Error 1.

1. It is claimed by the appellant that the deed recorded in Liber 3131, folio 180 *et seq.*, Land Records D. C., is inadmissible in evidence, because the provisions thereof are champertous, as that term is judicially defined. An analysis of decisions shows that the following ingredients must concur in a deed in order to support that objection thereto:

(a) The subject-matter of the deed must be land, adversely held, whereof the grantors are out of possession.

(b) The grantee of the deed must be an attorney, who

takes all of grantor's title in the realty, subject to an accounting possibly.

(c) The deed must contemplate the institution of possessory proceedings by the attorney in his own name.

(d) The deed must provide expressly or impliedly that the costs of the litigation shall be borne by the attorney *pendente lite*.

(e) That the recovery, if any, shall enure to the benefit of the attorney by his personal acquisition of the land; though possibly subject to accounting upon the sale.

If any, and especially if all, of these elements are lacking in the deed at bar, it is respectfully urged that the characterization "champertous" would not apply thereto. The deed (Rec., p. 4) shows that the grantors therein act as heirs-at-law of Thomas Ritter; that they convey the property described in the deed to an attorney *as Trustee*, upon seven specified trusts. It is not seriously contended at the bar that the second, third, fourth, fifth, or seventh trust is open to the objection of champerty. It is contended by appellant that the first and sixth trusts are within that objection. That the deed did not contemplate litigation is apparent by trust 4 (reaffirmed in trust 7), wherein the trustee is directed to reimburse Mrs. Wilson and Mrs. Baier for any expenditures made by either of them which enured ultimately to the exclusive benefit of the grantors in the deed. It must be apparent to the court that if the grantors in the deed could have foreseen what occurred after its execution this provision would have been omitted therefrom. Its presence is reconcilable only upon the hypothesis that no litigation was contemplated by the execution of the deed. The first and sixth trusts must therefore be construed in the light of the fourth trust, just as all parts of a statute are to be consulted to apply the doctrine of *pari materia*. In the

following cases contracts have been judicially declared to be champertous: *Matthews vs. Hevner*, 2 App. C., 349; *Johnson vs. Van Wyck*, 4 App. C., 294; *Peck vs. Heurich*, 6 App. C., 273; affirmed in 167 U. S., 624; *Peck vs. Birtwell*, 8 App. C., 156. In the following cases contracts have been declared not to be champertous: *Lewis vs. Bell*, 17 Howard, 616; *McPherson vs. Cox*, 96 U. S., 404; *Stanton vs. Haskin*, 1 McArthur, 558.

The Supreme Court clearly shows the line of demarcation between actionable and non-actionable contracts, in this respect, when it says:

"The result is that this action cannot be maintained by the trustees claiming under the deed, although a similar action might have been maintained by the grantors in their own names." *Peck vs. Heurich*, 167 U. S., 624, 632.

The Supreme Court did not mean to prohibit a client from compensating an attorney from the subject-matter of a litigation; it was even willing to go farther and give the attorney a lien thereon for his compensation (*McPherson vs. Cox*, 96 U. S., 404). That the court did mean to prevent conditions whereby an attorney assumed the dual role of client and attorney, conducting a litigation against an adverse party with his own means and in his own name (*Peck vs. Heurich*, 167 U. S., 632). As the deed at bar is obviously not drawn:

(a) In respect of land adversely held, whereof grantors were out of possession, since appellant's title was not adverse to appellee's—both claiming under the same source of title.

(b) To place a title in fee in an attorney, but only to create the attorney a trustee to perform permissible duties for the grantors they were themselves unable to accomplish.

(c) To institute possessory proceedings in the attorney's own name.

(d) To compel the attorney to defray the costs of such litigation personally.

(e) To cause a successful recovery to enure to the personal benefit of the attorney, but exactly the reverse thereof, it must be clear to the court that none of the essential elements of a champertous contract are found at bar; and that such objection thereto by appellant is not well founded.

It will however doubtless be argued that the attorney was directed (trust 1) "to perfect the title to said property by acquiring adverse outstanding claims or encumbrances thereon," wherefrom a champertous feature might be implied. If reference were made to the same liber (3131) wherefrom the deed at bar is taken, to conveyances recorded therein at folios 175, 176, 178, 179, *et seq.*, whereunder appellee also holds title, it would not be difficult to ascertain the intention of the parties by the insertion of this provision. That the institution of possessory proceedings was not thereby contemplated is clear from the fact that on December 5, 1906, the grantors were in possession of the property, with the assent of appellant Wilson, as appears from the tenant's testimony (Rec., p. 7) wherein he stated that he paid rent to the trustee from July 23, 1906, to February 20, 1907, when he changed his allegiance to Mrs. Wilson.

Assignment of Error 2.

If assignment of error 1 is well taken it does not follow that assignment of error 2 is well taken. Appellee holds under deeds recorded in Liber 3131, folios 175, 176, 178, 179, *et seq.*, besides the one under dispute recorded at folio 180. If the latter were void he would still hold under four others not impeached.

Assignment of Error 3.

As the weight and credibility of a witness' testimony are purely questions addressed to the function of a jury (*Reid vs. Anderson*, 13 App. C., 30), it was entirely proper for the trial court, if it appeared upon the whole case that questions were presented for the determination of the jury, not to invade their province. Moreover, the witness distinctly stated (Rec., p. 14) that he had not acquired his information about the genealogy of his family from his attorney, but knew it all long before he ever met his attorney. The trial court exercised a wholesome judicial discretion in permitting the entire deposition of the witness to be considered by the jury, and should be sustained therein by this court (*Kohner vs. Traction Co.*, 22 App. C., 181; *Rockwell vs. Traction Co.*, 25 App. C., 98; *Gassenheimer*, 24 App. C., 312).

Assignment of Error 4.

This court has on numerous occasions stated when a trial court is, and when it is not, justified to direct a verdict, that it might be tedious to do more than refer to the cases wherein this court has drawn the line of demarcation between the function of the court and that of the jury, (*R. R. Co. vs. Carrington*, 3 App. C., 101; *Worthen vs. Hammond*, 5 App. C., 167; *Hardy vs. Wise*, 5 App. C., 108; *R. R. Co. vs. Golway*, 6 App. C., 143; *D. C. vs. Gray*, 6 App. C., 314; *Adams vs. R. R. Co.*, 9 App. C., 26; *Barbour vs. Moore*, 10 App. C., 30; *Hazleton vs. Le Duc*, 10 App. C., 379; *Rouser vs. R. R. Co.*, 13 App. C., 320; *Green vs. U. S.*, 25 App. C., 549; *Ubhoff vs. Brandenburg*, 26 App. C., 3; *Dodge vs. Rush*, 28 App. C., 149).

Assignment of Error 5.

Witness Dunnington produced the Directory of Washington, D. C., of 1858, wherefrom it appeared that "Lydia Ritter, widow of William Ritter," lived here then (Rec., p. 9). Witness Dove (Rec., p. 11) testified she knew the old lady (Lydia) as the mother of three boys and a girl. Witness Davis (Rec., p. 8) knew the same three boys and a girl. Witness Buck (Rec., p. 11) testified to seeing a headboard on her grave marked "Lydia Ritter, widow of William." Witness Griffin (Rec., p. 12) testified similarly. Thomas Ritter, the common source of title, stated under oath (Rec., p. 9) that his father and John R. Ritter's father were brothers. The trial court was of opinion that such evidence was competent for the consideration of the jury in ascertaining whether Lydia Rebecca Ritter was lawfully married; and it is submitted a sound legal discretion was thus exercised.

Assignment of Error 6.

Witness Rachel C. Hoile testified *de bene esse* on the 8th day of August, 1907, in the city of Washington, D. C., in cause at law 49512, at a place where appellant Wilson and her counsel Latimer were both present, that Molly Ritter died unmarried. This aged witness lived in Maryland, both at the time this deposition was taken and also at the time of the trial recently held, and her deposition was offered by plaintiff. Defendant objected to the deposition being read unless proof were forthcoming of an unsuccessful effort to bring her personally before the jury. The exigencies of this trial did not then make such effort possible. The objection was sustained and the deposition excluded. The witness was cross-examined by Mr. Latimer in the deposition. Under well-recognized principles of estoppel, he

should not be permitted to place an obstacle to testimony going before the jury and then object to the lack thereof.

Assignment of Error 7.

The criticism of assignment No. 6 is also applicable to assignment No. 7.

Assignment of Error 8.

The criticism of assignment No. 6 is also applicable to assignment No. 8.

Assignment of Error 9.

Witness Madison testified William Ritter is dead (Rec., p. 9). The death certificate shows he died October 5, 1886 (Rec., p. 8), and that he died unmarried. Witness Buck testified (Rec., p. 11) that William died unmarried. Witness Griffin testified to the same effect (Rec., p. 12). It is submitted that when official and unofficial evidence concurred in the same condition of facts it would have been an abuse of judicial discretion to have withdrawn this question from the consideration of the jury.

Assignment of Error 10.

As stated in answer to assignment 9, both the official and unofficial evidence agreed that William Ritter died unmarried. If the jury so found, as apparently they did, it was impossible for them to find that William had issue.

ARGUMENT.

Certain legal questions are so interwoven with the ten assignments of error that they might be advantageously considered apart therefrom.

1. The title to the property being in Thomas Ritter, it would be legally presumed that his widow had only a dower right therein. If she had any different title it should have been proved in equity (*Whitaker vs. Loan Co.*, 7 App. C., 203).

2. The widow and her privies are estopped from claiming a different title than her dower by the recital in the mortgage executed by her (Liber 1783, folio 296 *et seq.*, Land Records D. C.; *Morris vs. Wheat*, 8 App. C., 379).

3. If the sole title of the widow in the land was a dower right it became extinguished by her death. A lease by her or her agent automatically expired with the termination of her estate by death (*Velati vs. Dante*, 41 W. L. R., 40; *Brown vs. Colson*, 41 Ga., 42; *Moore vs. Gilliam*, 5 Munford, 346; *Sis vs. Boarman*, 11 App. C., 116).

4. The tenant Himelright was, by the widow's death, absolved from his previous relation to Floyd E. Davis (*Velati vs. Dante*, 41 W. L. R., 40), and it was competent for him to sign a lease with a trustee, who was settling up the estate of Thomas Ritter, as he did by signing such lease July 23, 1906—with the assent of appellant Wilson (Rec., p. 7). Such act did not constitute an attornment. The tenant was not concerned as to who succeeded to Thomas Ritter's title, whether the husband's or the wife's kin.

EXHIBIT.

William Ritter and Lydia Rebecca Ritter	{	Ephraim Ritter and — Ritter	{ John Rufus Ritter (sailor) Enoch Ritter
		J. Frank Ritter and — Ritter	{ Unnamed infant died in childbirth
		Emanuel Ritter and Jennie Ritter	{ Thomas (or Tony) Ritter (propositus) William Ritter Mollie Ritter
		Louise Ritter (died unmarried)	
		Mary Jane Ritter and Charles G. Griffin	{ Albert Jerome Griffin Charles Edward Griffin William Harrison Griffin Charles William Griffin Lydia Rebecca Griffin (married Faunce) Mary Virginia Griffin (married Bayha) Catherine M. P. Griffin (married Buck) Walter N. S. Griffin

5. The question who succeeded to Thomas Ritter's title is determined by sections 948 to 951 of the Code for the District of Columbia. Certain degrees of nearness of kin to the intestate are thereby created, so that persons in the first degree would take, to the exclusion of all in the subsequent degrees. Upon failure of those in the first degree, those in the second degree would similarly bar those more remote. So on until the most remote kin are reached (section 951, Code). Upon failure of any kin whatever, the property would escheat to the United States (section 962).

6. The theory of appellant Wilson is that if plaintiff fails in proving title then automatically her title to the property is established under section 951, Code. It is therefore proper to examine into plaintiff's title, to the extent called for by the assignments of error.

The fifth assignment goes to the root of appellee's title. He was not able to offer proof of a ceremonial marriage between Lydia Rebecca Ritter and the father (William Ritter) of the three boys and two girls, whom she acknowledged to strangers to be her children. Can such marriage be inferred from circumstances? Is the birth of five children one circumstance? Is the insertion of her name in Washington Directory of 1858 as the "widow of William Ritter" another circumstance? Is the insertion of her name in the United States Census of 1860 as the "widow of William Ritter" another circumstance? Is the inscription on her grave as being the "widow of William Ritter" another circumstance? Is the sworn statement of Thomas Ritter, that his father and Rufus Ritter's father were brothers (Rec., p. 9) another circumstance? Are such circumstances competent to be submitted to a jury, from which a legal marriage could be inferred? See exhibit attached hereto. Those questions present no novelty at the bar and have heretofore been judicially considered (*Jewell vs. Jewell*, 1 Howard, 219; *Meister vs. Moore*, 96 U. S., 76; *Md. vs. Baldwin*, 112

U. S., 490, 494; *Travers vs. Reinhardt*, 25 App. C., 567, affirmed in 205 U. S., 423; *Green vs. Norment*, 5 Mackey, 80; *Diggs vs. Wormley*, 21 D. C., 477; *Pierce vs. Jacobs*, 18 D. C., 498; *Jennings vs. Webb*, 8 App. C., 43; *Posey vs. Hanson*, 10 App. C., 496).

The sixth, seventh, eighth, ninth, and tenth assignments are all subordinate to the fifth. These having been discussed before, no repetition here is necessary.

7. The foundation of the litigation at bar, lasting from February 20, 1907 (Rec., p. 7), to date, is due to a lease signed by the former tenant, Himelright, on that date with appellant Wilson as landlord, whereby this tenant annulled a lease signed by him on July 23, 1906, with John H. Adriaans, trustee, as landlord. Are titles in the District of Columbia so flexible and unstable that an ordinary tenant can select his landlord at will (*Housam vs. Kuneche*, 15 D. C., 297; *Rollers vs. Carruthers*, 5 App. C., 368; *Woodward vs. Brown*, 13 Peter, 1; *Stott vs. Rutherford*, 92 U. S., 107; *William vs. Morris*, 95 U. S., 444; *Morris vs. Wheat*, 11 App. C., 210; *McFarlane vs. Kirby*, 28 App. C., 391).

8. From March 3, 1906, until February 20, 1907, appellant Wilson was solicitous to settle up the estate of Thomas Ritter (Rec., p. 8). Before July 23, 1906, she had found the heirs of Thomas Ritter and advised the tenant to recognize their trustee in the payment of rent (Rec., p. 7). The courts have heretofore held that inconsistent action by a party at different times creates such estoppel as to disable such party to avail thereof (*Oneale vs. Thornton*, 6 Cranch (U. S.), 53; *Hiatt vs. Brown*, 15 Wall., 177; *Clark vs. U. S.*, 95 U. S., 559; *R. R. Co. vs. McCarthy*, 96 U. S., 258; *Kirk vs. Hamilton*, 102 U. S., 68; *Daniels vs. Tierney*, 102 U. S., 415; *Laughlin vs. Mitchell*, 121 U. S., 411; *Walter vs. Bickham*, 122 U. S., 320; *Davis vs. Wakeles*, 156 U. S., 691; *Walker vs. Brown*, 165 U. S., 654; *R. R. Co. vs. Osborn*, 193 U. S., 17; *Utermehle vs. Norment*, 197 U. S., 40; *Hariman vs. Securities Co.*, 197 U. S., 244; *Iron Co. vs. Cun-*

ningham, 44 Fed. R., 244; Shillito *vs.* McClung, 45 Fed. R., 779; Lewis *vs.* Dennison, 2 App. C., 387; Int. Co. *vs.* Lamont, 2 App. C., 532; Evans *vs.* Schoonmaker, 2 App. C., 62; Mann *vs.* Cooper, 2 App. C., 226; Mackie *vs.* Howard, 3 App. C., 461; Sanche *vs.* Electrolibration Co., 4 App. C., 453; U. S. *vs.* Maloney, 4 App. C., 505; Marshall *vs.* Augusta, 5 App. C., 183; Lansburgh *vs.* D. C., 8 App. C., 10; U. S. *vs.* Boyd, 8 App. C., 440; Hamilton *vs.* Rathbone, 9 App. C., 48; Copley *vs.* Eyster, 9 App. C., 373; Anderson *vs.* Reid, 10 App. C., 426; Dexter *vs.* Gordon, 11 App. C., 60; Morris *vs.* Wheat, 11 App. C., 201; Deposit Co. *vs.* Gray, 12 App. C., 276; Bowie *vs.* Hume, 13 App. C., 286; Bean *vs.* Wheatley, 13 App. C., 473; Keane *vs.* Chamberlain, 14 App. C., 84; Sinnott *vs.* Kennaday, 14 App. C., 1; Moyers *vs.* Cummings, 17 App. C., 524; Bank *vs.* Construction Co., 17 App. C., 524; Bride *vs.* McFarland, 18 App. C., 120; Latney *vs.* U. S., 18 App. C., 265; Oettingham *vs.* D. C., 18 App. C., 375; Smith *vs.* Sullivan, 20 App. C., 553; Shappirio *vs.* Goldberg, 20 App. C., 185; Clark *vs.* Barber, 21 App. C., 274; Utermehle *vs.* Norment, 22 App. C., 31; Dangerfield *vs.* Williams, 26 App. C., 508; U. S. *vs.* Day, 27 App. C., 458; Watson *vs.* Carver, 27 App. C., 555; Winslow *vs.* R. R. Co., 28 App. C., 126; Morse *vs.* Hine, 29 App. C., 433; Lyon *vs.* Bursey, 36 App. C., 235; Rawlett *vs.* Nash, 38 App. C., 598).

9. Whether the relation of the parties creates any adverse possession between them by the hostile act of appellant Wilson entering upon the premises and procuring the attornment of the tenant has also heretofore been judicially considered (Ashley *vs.* Bradshaw, 14 App. C., 485; 180 U. S., 59; Hogan *vs.* Kurtz, 94 U. S., 773; Sharon *vs.* Tucker, 144 U. S., 533; Bradshaw *vs.* Stott, 4 App. C., 527; Ebbinghaus *vs.* Killian, 1 Mackey, 247; Thaw *vs.* Ritchie, 4 Mackey, 347; Ewing *vs.* Burnett, 11 Peter, 41; Burns *vs.* Byrne, 45 Iowa, 285; Newell *vs.* Woodruff, 30 Conn., 492; Price *vs.* Hall, 140 Ind., 314).

In concluding this review the attention of the court is called to section 988 of the Code, whereby it is provided that the plaintiff is entitled to a verdict if he can show that "*as against the defendant*" he is entitled to immediate possession of the premises. In the case at bar three of the defendants have removed from the premises *pendente lite*, do not join in the appeal from the judgment, acquiesce therein, and tacitly confess the propriety of the verdict. As to the remaining defendant, such inconsistent conduct is shown as to create an estoppel to deny plaintiff's title. It is a serious question whether appellant Wilson, by recording her lease (Rec., p. 7), has violated section 845 (a) of the Code. The possession of Ann Catherine Ritter from September 21, 1897, until March 3, 1906, was as widow and not as heir, of Thomas Ritter.

By comparison of errors assigned in the record (p. 16) with the errors assigned in the appellants' brief, it will be observed that the number has been reduced from 10 to 3, and that original assignments 4, 5, 6, 7, 8, 9, 10 in the record are apparently waived.

Many of the statements of fact in appellants' brief are not only unsupported, but contradicted, by the evidence, *e. g.*:

(a) The evidence shows at the time of the execution of the deed (Rec., p. 4), December 5, 1906, the grantors therein were in possession (Rec., p. 7, Himelright).

(b) Being then in possession, they could not intend, by the deed, to direct possessory proceedings.

(c) The possession was not physically altered until February 20, 1907.

(d) The attorney-trustee then had seven months' rent of \$12.50 per month, besides the \$100 deposit of the prospective purchaser, Abell, in his possession, who forfeited his deposit by declining to take the title. This money was applied to

defraying expenses occasioned by the conflict begun by appellant Wilson and her attorney, J. Wilmer Latimer, February 20, 1907. Additional costs have also been supplied by appellee, which are credited on the debt for purchase-money he owes his grantors.

(e) The litigation successively carried on has never been in the name of the attorney-trustee.

Respectfully submitted,

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